

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Request for
Arbitration of Interconnection Agreements
by Certain Independent Telephone
Companies with Qwest Wireless LLC and
TW Wireless LLC

ORDER DENYING
REQUEST TO DISMISS

Qwest Wireless LLC and TW Wireless LLC ("Wireless Companies") filed a Motion to Dismiss the Petition for Arbitration with the Public Utilities Commission ("PUC"). In its Order Denying Motion to Dismiss, Granting Arbitration and Assigning Arbitrator, issued December 22, 2003, the PUC declined to dismiss the petition "at this time."^[1] On December 22, 2003, the Wireless Companies filed its Response to Certain Minnesota Independent Telephone Companies' Petition for Arbitration with the Administrative Law Judge. In its Response, the Wireless Companies requested that the Administrative Law Judge determine that the dispute between the parties was not an appropriate issue for an interconnection arbitration. The Minnesota Independent Coalition ("MIC") filed its reply on January 9, 2004. The Wireless Companies filed a further reply on January 14, 2004, and the MIC filed its response on January 16, 2004. The Department of Commerce ("Department") filed a Reply Memorandum dated January 16, 2004.

M. Cecilia Ray, Attorney at Law, Moss & Barnett, 4800 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-4129, appeared on behalf of MIC. Jason D. Topp, Attorney at Law, 200 South Fifth Street, Room 395, Minneapolis, MN 55402, and Larry Espel, Attorney at Law, Greene Espel PLLP, 200 South Sixth Street, Suite 1200, Minneapolis, MN 55402, appeared on behalf of Qwest Wireless LLC and TW Wireless LLC. Linda S. Jensen, Assistant Attorney General, 445 Minnesota Street, Suite 1400, St. Paul, MN 55101-2131, appeared on behalf of the Department of Commerce.

IT IS HEREBY ORDERED:

The Wireless Companies' Request to Dismiss the Arbitration Proceeding without a recommendation is DENIED.

The schedule set forth in the Prehearing Order dated December 31, 2003, remains in effect.

Dated this 21st of January, 2004.

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

MEMORANDUM

The Wireless Companies assert that their dispute with the MIC is not related to the terms and conditions of the Interconnection Agreement that the parties are negotiating. Instead, the dispute is over compensation that the Wireless Companies should pay to the MIC for connecting wireless calls through the MIC's wirelines, prior to the interconnection agreement. The Wireless Companies characterize the issue as whether the ICA can be "backdated" to cover a period of time prior to the PUC's approval of the ICA.^[2] Also, the Wireless Companies assert that the FCC allows for terms and conditions prior to approval of the ICA in two specific instances, neither of which applies to the facts of this negotiation. Accordingly, the Wireless Companies request that the arbitration be dismissed.

The MIC asserts that the terms under which the Wireless Companies were to compensate the MIC members for use of their networks for periods prior to Commission approval of their interconnection agreements has been "an important and fundamental topic of negotiations."

The Wireless Companies' request will be considered in the same manner as a motion to dismiss, governed by Rule 12 of the Minnesota Rules of Civil Procedure.^[3] In deciding such motions the complaint must be liberally construed.^[4] Here, MIC's Petition sets out its claim in a manner similar to a complaint. It alleges that Wireless Companies and MIC have engaged in negotiations concerning an interconnection agreement but have not been able to resolve the issue of compensation for historical usage. The Wireless Companies argue that compensation for historical usage is outside the scope of the arbitrator's authority.

The controlling legal analysis is clearly set forth in *Coserve Limited Liability Corp. v. Southwestern Bell Telephone Co.*^[5] It established that parties may request arbitration of any issue raised in negotiations of the interconnection agreement, even if the issue was not a required element of the interconnection. In that case, Coserv requested an interconnection agreement with Southwestern Bell Telephone (SWBT) and the parties proceeded with voluntary negotiations pursuant to 47 U.S.C. § 251. The obligations of incumbent carriers and competitors are listed in Section 251 (b), and additional duties are placed on the incumbent carriers in Section 251 (c). The incumbent carrier's duty to negotiate is limited in scope to "the particular terms and conditions of agreements to fulfill the duties described in [§ 251(b) and (c)]."^[6] But the parties are free to negotiate other issues that may be related. The applicable section states:

“an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsection (b) and (c) of section 251 of this title.”^[7]

In the event that negotiations fail, the Fifth Circuit held that any issue that was raised as part of the negotiations between the incumbent carrier and the competitor may be subject to the arbitration provisions. In Coserv, the court concluded that “compensated access” was not among the topics covered by the duty to negotiate, and that SWBT had consistently refused to negotiate compensated access with Coserv. Since SWBT had consistently refused to include the topic in its negotiations, it was not subject to arbitration of the issue.

The Fifth Circuit’s reasoning is persuasive and is based upon a logical reading of the applicable provisions of the Telecommunications Act. Its analysis is consistent with *US West Communications, Inc., v. Public Utilities Commission*, 55 F. Supp.2d 968 (D. Minn. 1999). In that decision, the Court found that the parties participating in negotiations have a duty to negotiate certain issues, but that they are not limited to those or bound by the directives of § 251 (b) or (c). If the parties are not able to resolve any of the open issues that formed the subject of their negotiations, a party “to the negotiation may petition a State commission to arbitrate *any* open issues.”^[8] The parties are not limited to issues enumerated in § 251, “but rather are limited to the issues which have been the subject of negotiations among themselves.”^[9]

The State commission has the authority to resolve each such issue set forth in the petition for arbitration and the response to it. Section 252 (b)(4)(C) states that “[t]he State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section. ...”

In resolving the issues raised, the state commission must assure that the requirements of section 251 are met, but the resolution is not confined only to those issues. In order to be subject arbitration, the issue must have been raised in the course of negotiations, and its resolution may not violate or conflict with section 251.^[10]

The factual issue raised in this case is whether compensation for historical usage was part of the parties’ negotiation.

Since the Wireless Companies are requesting that the arbitration be dismissed, the facts concerning whether the compensation for historical usage was part of the negotiations with MIC must be viewed in a light most favorable to MIC. Here, MIC asserts that compensation for historical usage has been a topic of negotiation, and not separate from the discussion relating to interconnection. In support, MIC contends that the Wireless Companies have conceded that compensation for historical usage was an issue. MIC points to the Wireless Companies Response to the Petition which states:

As the Wireline Carriers accurately describe in their Petition, the parties have engaged in negotiations over the proposed terms and conditions of an interconnection agreement. These negotiations have resulted in an agreed upon interconnection agreement, with the exception of one issue. Specifically, the remaining issue is whether Qwest Wireless is obligated to pay reciprocal compensation for time periods predating the agreement.^[11]

The Wireless Companies assert that there has been no negotiation of reciprocal compensation predating the argument. It now argues:

Qwest was absolutely clear in establishing that it would not negotiate or discuss the possibility of retroactively applying the interconnection agreement. Qwest, in fact, was absolutely clear in establishing that it would not negotiate or discuss the possibility of retroactively applying the interconnection agreement.^[12]

Although the Wireless Companies strongly assert this point of view, there is no affidavit or correspondence or any other form of evidence of any type to support its position. Since the facts must be viewed in a light most favorable to the non-moving party, these unsupported assertions are insufficient. Also, in considering a motion to dismiss, it is immaterial whether the non-moving party ultimately will be able to prove the facts alleged, if evidence could be presented to support the claim.^[13]

The MIC also supports its argument by pointing to its submission of section seven of the draft interconnection to the Wireless Companies with language to address compensation for time periods predating the agreement.^[14] However, this is not persuasive because, by itself, it does not show that the Wireless Companies had invited such a provision, or whether the MIC offered the provision unilaterally, with the hope of including the issue in the negotiation.

In summary, absent any evidence to back up the Wireless Companies assertion that the compensation for past connections was not part of the parties' negotiation, the Wireless Companies' request to have the matter dismissed is denied. The issue of whether the Commission has the authority to award compensation for transport and termination of telecommunication traffic prior to the request for negotiation of the interconnection agreement will be addressed as part of the arbitration.

B.J.H.

^[1] Order Denying Motion to Dismiss, Granting Arbitration and Assigning Arbitrator, December 22, 2003, at 3.

^[2] Wireless Companies Reply, Dec. 22, 2003, at 3.

^[3] Minn. R. 1400.6600; Minn. R. Civ. Pro. 12.02(e).

^[4] *Terwillger v. Hennepin County*, 561 N.W. 2d 909 (Minn. 1997).

^[5] 350 F.3d 482 (5th Cir. 2003).

^[6] *Id.*, at 485.

^[7] Id., at 487, quoting 47 U.S.C. § 252.

^[8] 55 F. Supp. 2d at 985, quoting 47 U.S.C. § 252 (b) (1).

^[9] 55 F. Supp. 2d at 985.

^[10] 55 F. Supp.2d at 985-986.

^[11] Qwest Wireless Response, page 2.

^[12] Response of Qwest Wireless LLC to the Reply Comments of Members of the Minnesota Independent Coalition, pages 1-2.

^[13] Martens v. Minnesota Mining and Manuf., 616 N.W. 2d 732 (Minn. 2000), reh. denied.

^[14] A copy of the draft Reciprocal Transport and Termination Agreement, including the disputed terms, is attached to the MIC Request for Arbitration.